

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT TIMOTHY BOLLA,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social
Security,
Defendant.

CASE NO. CV 17-1640 SS

MEMORANDUM DECISION AND ORDER

INTRODUCTION

21 Robert Timothy Bolla ("Plaintiff") seeks review of the final
22 decision of the Acting Commissioner of Social Security (the
23 "Commissioner" or "Agency") denying his application for social
24 security benefits. The parties consented, pursuant to 28 U.S.C.
25 § 636(c), to the jurisdiction of the undersigned United States
26 Magistrate Judge. (Dkt. Nos. 6, 8, 13). For the reasons stated
27 below, the decision of the Commissioner is REVERSED and this case

1 is REMANDED for further administrative proceedings consistent with
2 this decision.

3

4 **III.**

5 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

7 To qualify for disability benefits, a claimant must
8 demonstrate a medically determinable physical or mental impairment
9 that prevents the claimant from engaging in substantial gainful
10 activity and that is expected to result in death or to last for a
11 continuous period of at least twelve months. Reddick v. Chater,
12 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d) (1) (A)).
13 The impairment must render the claimant incapable of performing
14 work previously performed or any other substantial gainful
15 employment that exists in the national economy. Tackett v. Apfel,
16 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.
17 § 423(d) (2) (A)).

18

19 To decide if a claimant is entitled to benefits, an ALJ
20 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The
21 steps are:

22

23 (1) Is the claimant presently engaged in substantial gainful
24 activity? If so, the claimant is found not disabled. If
25 not, proceed to step two.

26 (2) Is the claimant's impairment severe? If not, the
27 claimant is found not disabled. If so, proceed to step
28 three.

1 (3) Does the claimant's impairment meet or equal one of the
2 specific impairments described in 20 C.F.R. Part 404,
3 Subpart P, Appendix 1? If so, the claimant is found
4 disabled. If not, proceed to step four.

5 (4) Is the claimant capable of performing his past work? If
6 so, the claimant is found not disabled. If not, proceed
7 to step five.

8 (5) Is the claimant able to do any other work? If not, the
9 claimant is found disabled. If so, the claimant is found
10 not disabled.

12 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
13 262 F.3d 949, 953-54 (9th Cir. 2001); 20 C.F.R. §§ 404.1520(b)-
14 (g) (1), 416.920 (b)-(g) (1).

16 The claimant has the burden of proof at steps one through four
17 and the Commissioner has the burden of proof at step five.
18 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an
19 affirmative duty to assist the claimant in developing the record
20 at every step of the inquiry. Id. at 954. If, at step four, the
21 claimant meets his or her burden of establishing an inability to
22 perform past work, the Commissioner must show that the claimant
23 can perform some other work that exists in "significant numbers"
24 in the national economy, taking into account the claimant's
25 residual functional capacity ("RFC"), age, education, and work
26 experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at
27 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner
28 may do so by the testimony of a VE or by reference to the Medical-

1 Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,
2 Appendix 2 (commonly known as "the grids"). Osenbrock v. Apfel,
3 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both
4 exertional (strength-related) and non-exertional limitations, the
5 Grids are inapplicable and the ALJ must take the testimony of a
6 vocational expert ("VE"). Moore v. Apfel, 216 F.3d 864, 869 (9th
7 Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir.
8 1988)).

9

10 **III.**

11 **THE ALJ' S DECISION**

12

13 The ALJ employed the five-step sequential evaluation process
14 in evaluating Plaintiff's case. At step one, the ALJ found that
15 Plaintiff has not engaged in substantial gainful activity since
16 October 23, 2012, the alleged onset date. (AR 31). At step two,
17 the ALJ found that Plaintiff's diabetes mellitus, type II; a
18 history of kidney stones, partially resolved; degenerative joint
19 disease of the left shoulder; and obesity are severe impairments.
20 (AR 31). At step three, the ALJ determined that Plaintiff does
21 not have an impairment or combination of impairments that meet or
22 medically equal the severity of any of the listings enumerated in
23 the regulations. (AR 34).

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1 The ALJ then assessed Plaintiff's RFC and concluded that he
2 can perform medium work, as defined in 20 C.F.R. § 404.1567(c),¹
3 except:

[Plaintiff] is limited to occasional climbing of ladders, ropes, and scaffolds and occasional reaching overhead bilaterally. [Plaintiff] is able to engage in frequent climbing of stairs or ramps and frequent stooping, kneeling, crouching, and crawling. [Plaintiff] must avoid concentrated exposure to vibration, unprotected heights, and operation of hazardous moving machinery.

13 (AR 34). At step four, the ALJ found that Plaintiff is capable of
14 performing past relevant work as a winery worker. (AR 38).
15 Accordingly, the ALJ found that Plaintiff was not under a
16 disability as defined by the Social Security Act since October 23,
17 2012, the alleged onset date. (AR 39).

IV.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. "[The] court may set aside the Commissioner's denial of benefits when the ALJ's findings are based on legal error or are not supported by substantial

26 ¹ "Medium work involves lifting no more than 50 pounds at a time with
27 frequent lifting or carrying of objects weighing up to 25 pounds. If
28 someone can do medium work, we determine that he or she can also do
29 sedentary and light work." 20 C.F.R. § 404.1567(c).

1 evidence in the record as a whole." Aukland v. Massanari, 257 F.3d
2 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1097); see
3 also Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing
4 Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

5

6 "Substantial evidence is more than a scintilla, but less than
7 a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v.
8 Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant
9 evidence which a reasonable person might accept as adequate to
10 support a conclusion." (Id.). To determine whether substantial
11 evidence supports a finding, the court must " 'consider the record
12 as a whole, weighing both evidence that supports and evidence that
13 detracts from the [Commissioner's] conclusion.' " Aukland, 257
14 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.
15 1993)). If the evidence can reasonably support either affirming
16 or reversing that conclusion, the court may not substitute its
17 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-
18 21 (citing Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453,
19 1457 (9th Cir. 1995)).

20

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v.

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DISCUSSION

23

24

A. The ALJ Failed To Properly Weigh The Treating Physicians'

Opinions

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An ALJ must afford the greatest weight to the opinion of the
claimant's treating physician. The opinions of treating physicians

1 are entitled to special weight because the treating physician is
2 hired to cure and has a better opportunity to know and observe the
3 claimant as an individual. Connett v. Barnhart, 340 F.3d 871, 874
4 (9th Cir. 2003); Thomas v. Barnhart, 278 F.3d 947, 956-57 (9th Cir.
5 2002); Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989).
6 Where the treating doctor's opinion is not contradicted by another
7 doctor, it may be rejected only for "clear and convincing" reasons.
8 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) (as amended).
9 Even if the treating physician's opinion is contradicted by another
10 doctor, the ALJ may not reject this opinion without providing
11 specific, legitimate reasons, supported by substantial evidence in
12 the record. Id. at 830-31; see Orn v. Astrue, 495 F.3d 625, 632
13 (9th Cir. 2007); Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198
14 (9th Cir. 2008). "If a treating physician's opinion is not given
15 'controlling weight' because it is not 'well-supported' or because
16 it is inconsistent with other substantial evidence in the record,"
17 the ALJ shall consider "specified factors in determining the weight
18 it will be given[, including] . . . the length of the treatment
19 relationship and the frequency of examination by the treating
20 physician[] and the nature and extent of the treatment
21 relationship between the patient and the treating physician." Orn,
22 495 F.3d at 631 (citation omitted); see 20 C.F.R. §§ 404.1527(d) (2)
23 (listing factors to consider), 416.927(d) (2) (same).
24

25 **1. Dr. Bernard**

26
27 On January 23, 2014, Jeanne Dustin Bernard, M.D., Plaintiff's
28 endocrinologist, opined that because of Plaintiff's uncontrolled

1 type 2 diabetes, he could occasionally lift ten pounds, frequently
2 lift less than ten pounds, stand/walk less than two hours in an
3 eight-hour day, and sit continuously for less than six hours in an
4 eight-hour day. (AR 388). Because of arthritis in his hands and
5 a frozen left shoulder, Plaintiff is moderately limited in the use
6 of his upper extremities. (AR 388). On February 17, 2015, Dr.
7 Bernard noted that Plaintiff's diabetes had progressed from type 2
8 (non-insulin dependent) to type 1 (insulin dependent). (AR 390).
9 She opined that due to Plaintiff's chronic fatigue, physical and
10 mental stress and high blood sugar readings, he is unable to work.
11 (AR 390). Dr. Bernard concluded that Plaintiff's "chronic
12 conditions will never change." (AR 390). The ALJ gave Dr.
13 Bernard's opinions "little probative weight," finding that they
14 are inconsistent with treatment notes and minimal conservative
15 care. (AR 37-38). The ALJ also rejected the opinions because the
16 forms were "brief and did not include any narrative discussion of
17 physical findings to support the assessed limitations." (AR 37-
18 38). The ALJ's analysis is not supported by substantial evidence.
19

20 First, Dr. Bernard's opinions were not mere check-the-box
21 forms. "The ALJ need not accept the opinion of any physician,
22 including a treating physician, if that opinion is brief,
23 conclusory, and inadequately supported by clinical findings."
24 Thomas, 278 F.3d at 957; see Molina v. Astrue, 674 F.3d 1104, 1111
25 (9th Cir. 2012) ("ALJ may permissibly reject check-off reports that
26 do not contain any explanation of the bases of their conclusions.")
27 (citation and alterations omitted). Here, however, Dr. Bernard's
28 opinions explained that Plaintiff's limitations were due to his

1 uncontrolled diabetes and complications related to his diabetes,
2 including osteoarthritis in both hands, a frozen left shoulder,
3 chronic fatigue and physical and mental stress, and high blood
4 sugar readings. (AR 388, 390).

5

6 Second, the ALJ's decision overlooks important evidence in
7 the medical records. The ALJ contends that Dr. Bernard's opinions
8 are inconsistent with the treatment notes because in October 2013
9 and February 2015, Plaintiff was intact neurologically. (AR 37-
10 38). To the contrary, on October 2, 2013, Plaintiff complained of
11 chronic fatigue, arthritis in his hands and severe back pain. (AR
12 332). On examination, Plaintiff was hyperglycemic and tested
13 positive for diabetic neuropathy. (AR 332). On February 17, 2015,
14 Plaintiff complained of fatigue and arthritis in his hips. (AR
15 397). On examination, Plaintiff was hyperglycemic with abnormal
16 neurological findings. (AR 397). A monofilament test and
17 vibratory hammer test, which are used to check for peripheral
18 neuropathy, were each positive bilaterally. (AR 397).

19

20 Further, Dr. Bernard's opinions were consistent with the
21 treatment notes and laboratory tests that she performed. Dr.
22 Bernard treated Plaintiff on a continuing basis beginning in
23 February 2013. (AR 332-75, 388, 390-427). At Dr. Bernard's initial
24 intake examination, she diagnosed type 2 diabetes mellitus,
25 uncontrolled with fluctuating blood sugars, arthritis, chronic
26 fatigue and frozen shoulder, along with muscular cramping and
27 numbness in both arms. (AR 343-45). Dr. Bernard concluded that
28 Plaintiff was experiencing hypoglycemic events due to problems with

1 insulin overcorrection. (AR 343). Dr. Bernard consistently found
2 that Plaintiff's diabetes was uncontrolled and noted large
3 fluctuations in his blood-sugar levels, with related hypoglycemic
4 events and difficulties determining the proper insulin dosage. (AR
5 332-75, 390-427). Dr. Bernard also found "additional diabetic
6 features," including positive monofilament and vibratory hammer
7 testing of Plaintiff's lower extremities. These tests are used to
8 test for diabetic neuropathy. (AR 332, 337, 340, 343, 397, 402,
9 406, 418). In January 2014, Dr. Bernard concluded that Plaintiff's
10 diabetes had progressed from type 2 to type 1. (AR 420).
11 Subsequently, Plaintiff's type 1 diabetes remained uncontrolled
12 despite Plaintiff's strict adherence to his treatment regimen. (AR
13 399, 403, 408, 413, 452). The ALJ cannot selectively rely on some
14 entries in the medical records while ignoring many others that
15 indicate continued, severe impairments. Garrison v. Colvin, 759
16 F.3d 995, 1017 (9th Cir. 2014); Holohan v. Massanari, 246 F.3d
17 1195, 1207 (9th Cir. 2001).

18

19 Finally, the ALJ does not explain how Plaintiff's "minimal
20 conservative care" (AR 37) is inconsistent with Dr. Bernard's
21 opinions regarding Plaintiff's limitations from diabetes. Dr.
22 Bernard concluded that "[Plaintiff's] condition is a hereditary
23 disease that runs in his family, meaning his chronic conditions
24 will never change." (AR 390). There is no cure for diabetes and
25 treatment for those with type 1 diabetes is limited to insulin
26 injections or the use of an insulin pump. See Mayo Clinic,
27 Diabetes, available at www.mayoclinic.org (last visited Dec. 18,
28 2017) (hereinafter "Mayo Clinic, Diabetes"). The ALJ does not

1 identify any additional or more aggressive care that is available
2 for someone with type 1 diabetes. See Rohan v. Chater, 98 F.3d
3 966, 970 (7th Cir. 1996) ("ALJs must not succumb to the temptation
4 to play doctor and make their own independent medical findings.").
5 Hugh Perkin, M.D., Plaintiff's urologist, noted in February 2015,
6 that Plaintiff "has incredibly high insulin requirements for his
7 diabetes and requires close monitoring and care."² (AR 431).
8 Despite Plaintiff strict adherence to his treatment regimen, his
9 diabetes remains uncontrolled, which "can have many adverse and
10 severe health affects [sic]."² (AR 431). Dr. Perkin concluded that
11 Plaintiff's health issues are not due to medication noncompliance
12 but are instead "a genetic and metabolic predisposition." (AR
13 431). Again, the record clearly demonstrates the severity of
14 Plaintiff's diabetic condition.

15
16 In sum, the ALJ did not provide specific and legitimate
17 reasons for rejecting Dr. Bernard's opinions. On remand, the ALJ
18 shall reevaluate the weight to be afforded Dr. Bernard's opinions.
19 If the ALJ finds appropriate reasons for not giving the opinions
20 controlling weight, the ALJ may not reject the opinions without
21 providing specific and legitimate reasons supported by substantial
22 evidence in the record.

27

28 ² The ALJ gave Dr. Perkin's conclusions "significant probative weight."
(AR 36).

1 **2. Dr. Sigmund**

2

3 On July 22, 2013, Stephen Sigmund, M.D., Plaintiff's primary
4 care physician, opined that because of Plaintiff's uncontrolled
5 type 2 diabetes and associated severe pain and fatigue, he is
6 unable to work for at least twelve months. (AR 457). On February
7 3, 2014, Dr. Sigmund opined that due to Plaintiff's type 1 diabetes
8 and associated complications, he could occasionally lift ten
9 pounds, frequently lift less than ten pounds, stand/walk less than
10 two hours in an eight-hour day, and sit continuously for less than
11 six hours in an eight-hour day. (AR 389). Dr. Sigmund also opined
12 that because of Plaintiff's osteoarthritis in both hands and a
13 frozen left shoulder, he has moderate limitations in his upper
14 extremities, bilaterally. (AR 389). The ALJ gave Dr. Sigmund's
15 opinions "little probative weight," finding that they were
16 inconsistent with mild physical evidence, treatment notes and
17 minimal conservative care. (AR 37). The ALJ also rejected the
18 opinions because the forms were "brief and did not include any
19 narrative discussion of physical findings to support the assessed
20 limitations." (AR 37). The ALJ's analysis is not supported by
21 substantial evidence.

22

23 First, Dr. Sigmund's opinions were not mere check-the-box
24 forms. Dr. Sigmund explained that Plaintiff's limitations were
25 due to his uncontrolled diabetes and complications related to his
26 diabetes, including osteoarthritis in both hands, a frozen left
27 shoulder, and chronic fatigue and pain. (AR 389, 457).

1 Second, the ALJ's decision again overlooks important medical
2 evidence when it considers Dr. Sigmund's opinions. The ALJ cites
3 three medical records in concluding that Dr. Sigmund's opinions
4 are contrary to "minor physical findings." (AR 37). These records,
5 however, identify chronic, largely uncontrolled impairments. (AR
6 444, 452, 460). On January 29, 2014, Dr. Sigmund concluded that
7 Plaintiff's diabetes is uncontrolled, requiring multiple and
8 various treatments that have been difficult for Plaintiff to
9 tolerate and with poor efficacy. (AR 452). On October 15, 2014,
10 Plaintiff complained of arthritis and chronic fatigue. (AR 444).
11 While Dr. Sigmund found that Plaintiff's fatigue was controlled,
12 he concluded that Plaintiff's uncontrolled diabetes and chronic
13 osteoarthritis were under only fair control. (AR 444). On June
14 30, 2015, Dr. Sigmund assessed active, uncontrolled diabetes with
15 kidney complications. (AR 460).

16

17 Further, Dr. Sigmund's opinions were consistent with the
18 treatment notes and laboratory tests that he performed or reviewed.
19 Dr. Sigmund treated Plaintiff on a regular basis beginning in
20 October 2012. (AR 314-31, 434-65). On December 13, 2012, Dr.
21 Sigmund diagnosed chronic renal insufficiency, type 2 diabetes and
22 fatigue. (AR 316). In February 2013, Dr. Sigmund concluded that
23 Plaintiff's diabetes was uncontrolled. (AR 323). In July 2013,
24 Dr. Sigmund opined that Plaintiff has chronic left shoulder pain,
25 fatigue, uncontrolled type 2 diabetes, back pain and osteoarthritis
26 in both hands. (AR 327-28). On examination, Dr. Sigmund found
27 that Plaintiff's left frozen shoulder causes difficulty of motion
28 passive and active in any direction greater than twenty degrees

1 and that Plaintiff's osteoarthritis causes difficulties with
2 activities of daily living. (AR 328). In January 2014, Dr. Sigmund
3 reviewed Dr. Bernard's treatment records and concluded that
4 Plaintiff's diabetes and fatigue are uncontrolled. (AR 452). In
5 April and June 2015, Dr. Sigmund reiterated that Plaintiff has
6 uncontrolled diabetes with kidney complications, chronic kidney
7 disease, chronic fatigue and malaise, and osteoarthritis. (AR 434-
8 37, 460-64).

9

10 Finally, as discussed above, the ALJ does not explain how
11 Plaintiff's "minimal conservative care" (AR 37) is inconsistent
12 with Dr. Sigmund's opinions or what other care Plaintiff should
13 have received. There is no cure for diabetes and treatment for
14 those with type 1 diabetes is limited to insulin injections or the
15 use of an insulin pump. The ALJ does not identify any additional
16 or more aggressive care that is appropriate for someone with type
17 1 diabetes.

18

19 In sum, the ALJ failed to provide specific and legitimate
20 reasons for rejecting Dr. Sigmund's opinions. On remand, the ALJ
21 shall reevaluate the weight to be afforded Dr. Sigmund's opinions.
22 If the ALJ finds appropriate reasons for not giving the opinions
23 controlling weight, the ALJ may not reject the opinions without
24 providing specific and legitimate reasons supported by substantial
25 evidence in the record.

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28

1 B. The ALJ Failed To Properly Assess Plaintiff's Type 1 Diabetes,
2 Fatigue, Neuropathy, Osteoarthritis And Kidney Disease As
3 Severe Impairments At Step Two Of The Evaluation

5 By its own terms, the evaluation at step two is a de minimis
6 test intended to weed out the most minor of impairments. See Bowen
7 v. Yuckert, 482 U.S. 137, 153-54 (1987) (O'Connor, J., concurring);
8 Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001) ("We have
9 defined the step-two inquiry as a de minimis screening device to
10 dispose of groundless claims."). An impairment is not severe only
11 if the evidence establishes a slight abnormality that has only a
12 minimal effect on an individual's ability to work. Smolen, 80 F.3d
13 at 1290 (internal citation omitted).

14
15 As a threshold matter, Plaintiff's type 1 diabetes is well
16 established by the record. While the ALJ found Plaintiff's type 2
17 diabetes to be a severe impairment (AR 31), she did not acknowledge
18 that in January 2014, Plaintiff's diabetes had progressed from type
19 2 to type 1 and that it subsequently remained uncontrolled despite
20 Plaintiff's strict adherence to his treatment regimen. (AR 399,
21 403, 408, 413, 420, 452). In type 1 diabetes, the immune system
22 attacks and destroys insulin-producing cells in the pancreas,
23 leaving the body with little or no insulin and a build-up of sugar
24 in the bloodstream. See Mayo Clinic, Diabetes.

25
26 Moreover, the medical record indicates that Plaintiff's type
27 1 diabetes has led to multiple long-term complications, including
28 nerve damage (neuropathy), kidney damage (nephropathy) and chronic

1 fatigue. See Mayo Clinic, Diabetes (noting that fatigue is a
2 common symptom of diabetes and that long-term complications include
3 neuropathy and kidney disease). Dr. Bernard consistently found
4 signs of diabetic neuropathy. (AR 332, 337, 340, 343, 397, 402,
5 406, 418). "Diabetic neuropathy is a type of nerve damage that
6 can occur if you have diabetes. High blood sugar (glucose) can
7 injure nerve fibers throughout your body, but diabetic neuropathy
8 most often damages nerves in your legs and feet." Mayo Clinic,
9 Diabetic Neuropathy, available at www.mayoclinic.org (last visited
10 Dec. 19, 2017). In April and June 2015, Dr. Sigmund concluded that
11 Plaintiff has uncontrolled diabetes with kidney complications,
12 including chronic kidney disease. (AR 434-37, 460-64). "Diabetic
13 nephropathy is a serious kidney-related complication of type 1
14 diabetes[, which] . . . affects the ability of your kidneys to do
15 their usual work of removing waste products and extra fluid from
16 your body." Mayo Clinic, Diabetic Nephropathy, available at
17 www.mayoclinic.org (last visited Dec. 19, 2017). Further,
18 Plaintiff's physicians consistently found that Plaintiff has
19 chronic fatigue and osteoarthritis of his hands and hips. (AR 327-
20 28, 332, 343-45, 388-90, 397, 434-37, 457, 460-64). Thus, the
21 ALJ's discussion of Plaintiff's condition does not fairly represent
22 the significance of his type 1 diabetes and the limitations and
23 complications arising from it, as reflected in the record.

24
25 Because a step-two evaluation is to dispose of "groundless
26 claims," and the evidence here established that Plaintiff suffered
27 from type 1 diabetes, neuropathy, kidney disease, chronic fatigue
28 and osteoarthritis, the ALJ erred by not addressing these ailments.

1 See Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005). The
2 evidence in the record was sufficient for the ALJ to conclude that
3 Plaintiff's type 1 diabetes, neuropathy, kidney disease, chronic
4 fatigue and osteoarthritis were severe impairments at step two
5 under the de minimis test.

6

7 Although Defendant argues that this error was harmless (Dkt.
8 No. 19 at 3-4), the Court disagrees. Because "[s]tep two is merely
9 a threshold determination[,] . . . [i]t is not meant to identify
10 the impairments that should be taken into account when determining
11 the RFC." Buck v. Berryhill, 869 F.3d 1040, 1048-49 (9th Cir.
12 2017). Thus, a step-two error is harmless if the impairment was,
13 in fact, considered in assessing the claimant's RFC. Id. at 1049
14 ("The RFC therefore *should* be exactly the same regardless of
15 whether certain impairments are considered 'severe' or not.")
16 (emphasis in original). Accordingly, where as in Buck, "all
17 impairments were taken into account" in assessing the claimant's
18 RFC, no remand is required. Id. Here, however, the ALJ did not
19 account in the RFC for the limitations documented by Plaintiff's
20 type 1 diabetes, neuropathy, kidney disease, chronic fatigue and
21 osteoarthritis, including associated complications such as chronic
22 fatigue, nerve damage and upper extremity limitations, as discussed
23 above. By failing to recognize Plaintiff's type 1 diabetes
24 neuropathy, kidney disease, chronic fatigue and osteoarthritis as
25 severe, and also failing to take into account the limitations
26 caused by Plaintiff's various illnesses, the ALJ did not provide
27 adequate consideration to all of Plaintiff's limitations during
28 the five-step evaluation process.

1 For the foregoing reasons, the matter is remanded for further
2 proceedings. On remand, the ALJ must evaluate Plaintiff's type 1
3 diabetes, neuropathy, kidney disease, chronic fatigue and
4 osteoarthritis as severe impairments at step-two and include
5 limitations imposed by Plaintiff's type 1 diabetes, neuropathy,
6 kidney disease, chronic fatigue and osteoarthritis in the ALJ's
7 overall evaluation of Plaintiff. The ALJ must consider the impact
8 of Plaintiff's type 1 diabetes, neuropathy, kidney disease, chronic
9 fatigue and osteoarthritis on his RFC.³

VI

CONCLUSION

14 Accordingly, IT IS ORDERED that Judgment be entered REVERSING
15 the decision of the Commissioner and REMANDING this matter for
16 further proceedings consistent with this decision. IT IS FURTHER
17 ORDERED that the Clerk of the Court serve copies of this Order and
18 the Judgment on counsel for both parties.

20 DATED: January 22, 2018

/S/

SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

26 Plaintiff also argues that the ALJ erred by failing to properly consider
listing 9.00, his credibility, and the VE's testimony. (Dkt. No. 14 at
11-19, 21-24). However, it is unnecessary to reach Plaintiff's arguments
27 on these grounds, as the matter is remanded for the alternative reasons
28 discussed at length in this Order.

1 THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS/NEXIS,
2 WESTLAW OR ANY OTHER LEGAL DATABASE.
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